STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 18, 2010
v	No. 288704 Wayne Circuit Court
TIMOTHY L. WILLIAMS, Defendant-Appellant.	LC No. 08-008423-FC

Before: SERVITTO, P.J., and ZAHRA and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of assault with intent to rob while armed, MCL 750.89, and carjacking, MCL 750.529a.[1] Defendant was sentenced, as a second habitual offender, MCL 769.10, to 18 to 35 years in prison for the assault with intent to rob while armed conviction to be served consecutive to 18 to 35 years' imprisonment for the carjacking conviction. We affirm defendant's convictions, but remand for resentencing.

In the early morning hours of June 6, 2008, Andre Le-France, a federal air marshal, was on his way home when he stopped to order food at a Coney Island restaurant drive-thru. After Le-France had placed his order, a young man wearing a bandana over his face and carrying what appeared to be a gun in his hand, approached the open window of Le-France's vehicle, and ordered Le-France out of the vehicle. As Le-France was reaching for his own service weapon, he saw and heard a gunshot. Le-France fired several shots at defendant and defendant ran from the vehicle. Le-France attempted to pursue defendant, then gave up and returned to his vehicle. Defendant was apparently hit with Le-France's shots and, immediately after the incident, went to the hospital for treatment of his gunshot wounds. Defendant was later arrested.

On appeal, defendant first argues that there was insufficient evidence to support his convictions. We disagree.

[1] Defendant was acquitted of assault with intent to commit murder, MCL 750.83, assault with intent to do great bodily harm less than murder, MCL 750.84, felonious assault, MCL 750.82, possession of a firearm by a person convicted of a felony (felon in possession), MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), second offense, MCL 750.227b.

A challenge to the sufficiency of the evidence is reviewed de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). "[A] court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). Moreover,

> [t]his Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses. Circumstantial evidence and reasonable inferences that arise from such evidence can constitute satisfactory proof of the elements of the crime. All conflicts in the evidence must be resolved in favor of the prosecution. [*People v Passage*, 277 Mich App 175, 177; 743 NW2d 746 (2007)(internal citations omitted)]

"The elements of assault with intent to rob while armed are: (1) an assault with force and violence; (2) an intent to rob or steal; and (3) the defendant's being armed. Because this is a specific-intent crime, there must be evidence that the defendant intended to rob or steal." *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003), quoting *People v Cotton*, 191 Mich App 377, 391; 478 NW2d 681 (1991).

Defendant asserts that the jury did not believe that defendant had a gun, and therefore, its finding him guilty of assault with intent to rob while armed was, necessarily, based on the prosecutor's argument that a hand in a pocket is the same as being armed with a dangerous weapon. Defendant contends that where there was no evidence that he possessed a weapon, threatened the victim, Le-France, with a weapon, or possessed an article fashioned in such a manner as to lead Le-France to reasonably believe the article was a dangerous weapon, such that the third element of assault with intent to armed while robbed was not established. We disagree.

In the case at bar, although the prosecutor emphasized the fact that defendant had his hand in his pocket and defendant focuses on this point, Le-France, in fact, testified that he saw defendant with a gun, and furthermore, that defendant fired a shot. Le-France stated that, as defendant ran up toward Le-France's vehicle, Le-France saw "what appeared to be a firearm" in defendant's hand. According to Le-France:

> By the time that I turned and my weapon had came out . . . he had already arrived . . . his weapon had turned, and I could see from his eyes and eyebrows he recognized my movement, and that's when I observed – and I pressed myself back in the seat and observed a muzzle flash and then a loud explosion, but very quickly after that I fired at him three times.

Throughout his testimony, Le-France refers to defendant having been armed with a gun during the incident. There was thus sufficient evidence from which a rational trier of fact could find defendant guilty beyond a reasonable doubt of assault with intent to rob while armed.

Defendant was also convicted of carjacking. MCL 750.529a provides, in relevant part:

> (1) A person who in the course of committing a larceny of a motor vehicle uses force or violence or the threat of force or violence, or who puts in fear any operator, passenger, or person in lawful possession of the motor vehicle, or any

> person lawfully attempting to recover the motor vehicle, is guilty of carjacking, a felony punishable by imprisonment for life or for any term of years.

Thus, a prosecutor must prove the following elements:

> (1) that the defendant took a motor vehicle from another person, (2) that the defendant did so in the presence of that person, a passenger, or any other person in lawful possession of the motor vehicle, and (3) that the defendant did so either by force or violence, by threat of force or violence, or by putting the other person in fear. [*People v Davenport*, 230 Mich App 577, 579; 583 NW2d 919 (1998).]

Defendant argues that taking is the essential element of the carjacking offense, and because he never touched the car and did not succeed in taking it, the evidence is insufficient to sustain his carjacking conviction. We disagree.

"[T]he interpretation and application of statutes is a question of law that is reviewed de novo." *People v Webb*, 458 Mich 265, 274; 580 NW2d 884 (1998). The primary goal of statutory interpretation is to give effect to the intent of the Legislature. *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006). If the wording or language of a statute is plain and unambiguous, the Legislature is deemed to have intended the meaning clearly expressed, and we must enforce the statute as written. *Shinholster v Annapolis Hosp*, 471 Mich 540, 549; 685 NW2d 275 (2004).

The language of MCL 750.529a does not suggest that a successful taking of the vehicle is a required element of carjacking. MCL 750.529a(2) provides:

> As used in this section, "in the course of committing a larceny of a motor vehicle" includes *acts that occur in an attempt to commit the larceny*, or during commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the motor vehicle. [Emphasis added.]

Therefore, attempted carjackings are covered by the statute. See, *People v Williams*, ___ Mich App ___; ___ NW2d ___ (Docket No. 284585, issued April 8, 2010), slip op, p 8 ("[T]he . . . statute [amended by 2008 PA 128] was intended to include attempts to commit the designated crime.").

In this case, although Le-France shot defendant before defendant could take his car, according to Le-France's testimony, defendant ran up to his vehicle (of which there is no dispute that Le-France was lawfully in possession), yelled three times for Le-France to get out,[2] and fired a gun. This evidence was sufficient for a rational trier of fact to find defendant guilty beyond a reasonable doubt of carjacking.

[2] In addition to the testimony from Le-France, defendant himself testified that he ran up to the vehicle and told Le-France (one time) to get out.

Defendant next argues that his conviction for assault with intent to rob while armed must be vacated because it is inconsistent with his acquittal of felonious assault and felony-firearm. We disagree.

Defendant did not raise this issue in the trial court, and therefore, we review for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 762-764; 597 NW2d 130 (1999). Success under the plain error rule requires the defendant to show prejudice, "meaning that the error must have affected the outcome of the lower court proceedings." *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003).

Although defendant was convicted of assault with intent to rob while armed, defendant was acquitted of felon in possession, MCL 750.224f, felony-firearm, MCL 750.227b, and felonious assault, MCL 750.82, which also require that a defendant be armed.[3] Nevertheless, "[w]henever a defendant is charged with different crimes that have identical elements, the jury must make an independent evaluation of each element of each charge. A jury in a criminal case may reach different conclusions concerning an identical element of two different offenses." *People v Goss (After Remand)*, 446 Mich 587, 597; 521 NW2d 312 (1994). "[A] jury may reach inconsistent verdicts as a result of mistake, compromise, or leniency." *Id*. Thus, although "[i]nconsistent verdicts might be cause for reversal when it is evident that the jury was confused, did not understand the instructions, or did not know what it was doing," *People v McKinley*, 168 Mich App 496, 510; 425 NW2d 460 (1988), no such evidence was presented in this case.

Defendant next argues that he was denied a fair trial because the prosecutor (1) elicited improper testimony regarding a bullet fragment, (2) misstated the law, and (3) bolstered the credibility of a witness. We disagree.

Generally, claims of prosecutorial misconduct are reviewed de novo to determine whether the defendant was denied a fair trial. *People v Wilson*, 265 Mich App 386, 393; 695 NW2d 351 (2005). Where there is no "contemporaneous objection or request for a curative instruction in regard to any alleged error," as in this case, "review is limited to ascertaining whether plain error affected defendant's substantial rights." *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008).

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[3] "Under MCL 750.224f, a person who has been convicted of a felony may not 'possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm' unless certain conditions are met." *People v Dupree*, 284 Mich App 89, 102; 771 NW2d 470 (2009), aff'd in part, remanded in part ___ Mich ___ (Docket No. 139396, July 23, 2010). In this case, the parties stipulated that defendant was a felon and his rights to carry a gun had not been restored. "The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). Finally, "[t]he elements of felonious assault are (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery." *People v Chambers*, 277 Mich App 1, 8; 742 NW2d 610 (2007), quoting *Avant*, 235 Mich App at 505.

"Given that a prosecutor's role and responsibility is to seek justice and not merely convict, the test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial." *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). This Court considers issues of prosecutorial misconduct "on a case-by-case basis by examining the record and evaluating the remarks in context and in light of defendant's arguments." *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). This Court also examines the relationship between the remarks and the evidence admitted at trial. *Brown*, 279 Mich App at 135. Curative instructions "are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements." *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008).

Defendant first objects to the prosecutor's questioning of Le-France regarding his eye injury and Le-France's testimony in response. At a pretrial motion to exclude evidence, the court ruled that, "any comments about [Le-France's eye injury,] we'll just say it was an object in his eye. There will be no reference to the bullet fragment." At trial, during the prosecutor's direct examination of Le-France, however, the questioning proceeded as follows:

> *Q.* Did you, in fact, go to the hospital?
>
> *A.* Yes.
>
> *Q.* And did you get treated for any injuries?
>
> *A.* Yes.
>
> *Q.* What kind of injuries did you have?
>
> *A.* Right now I currently have what they call a "foreign body substance" in the upper orbital region of my right eye. Some people might say it's [sic] bullet fragment but – because they don't know exactly what, fragments of rounds or whatever. It's just foreign body.
>
> *Q.* You don't know what it is?
>
> *A.* No. They don't know.

Defendant asserts that the improper admission of this evidence was unfairly prejudicial because it left the jury with the inference that Le-France was struck with a bullet and that the bullet was fired from a gun in defendant's possession. Defendant also asserts that the testimony was unresponsive to the question asked and was inexcusable coming from a law enforcement officer. We disagree.

It is clear from the transcript that the prosecutor's question was not open-ended and merely asked Le-France to describe his injuries. "As a general rule, unresponsive testimony by a prosecution witness does not justify a mistrial unless the prosecutor knew in advance that the witness would give the unresponsive testimony or the prosecutor conspired with or encouraged the witness to give that testimony." *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990). Here, there is no evidence of conspiring, and even if the prosecutor can be faulted for

not properly instructing Le-France to avoid mention of the bullet fragment, Le-France's testimony was not prejudicial to defendant.

Testimony that a bullet fragment injured Le-France's eye did not prove that defendant had a gun or fired a shot, because Le-France admitted to shooting his own gun four times. Furthermore, evidence technicians collected four casings from the crime scene, all from a 357-caliber weapon, which Le-France admitted that he possessed, and no gun was ever linked to defendant. Thus, evidence of a bullet fragment would not unfairly weigh on the jury's determination whether the nine-millimeter casing discovered by federal air marshals came from any weapon possessed by defendant. Moreover, as noted, the jury acquitted defendant of three weapons-related charges. Therefore, defendant cannot show that he was prejudiced by testimony about the bullet fragment.

Defendant next argues that the prosecutor improperly bolstered Le-France's credibility by repeatedly asserting that Le-France was telling the truth, and arguing that Le-France had no motive to lie about defendant firing shots because Le-France was legally justified in shooting defendant multiple times, and thus could not be prosecuted or punished for his actions. We disagree.

The comments from the prosecutor in closing argument cited by defendant do not support his argument that the prosecutor improperly bolstered Le-France's credibility, but rather, that the prosecutor was drawing the jury's attention to areas where Le-France's testimony was corroborated by physical evidence. While "[a] prosecutor may not vouch for the credibility of a witness by implying that the prosecution has some special knowledge that the witness is testifying truthfully," *People v Rodriguez*, 251 Mich App 10, 31; 650 NW2d 96 (2002), a prosecutor may argue from the facts and testimony that a witness is "credible or worthy of belief," and such an argument does not imply that the prosecutor "had some special knowledge" that the witness was testifying truthfully, *Dobek*, 274 Mich App at 66. Moreover, "the prosecutor may argue from the facts that a witness should be believed." *People v McGhee*, 268 Mich App 600, 630; 709 NW2d 595 (2005).

In addition, the prosecutor's statements in rebuttal regarding whether Le-France was subject to discipline were a direct response to defense counsel's comments in closing arguments implying that Le-France was in danger of losing his job and facing criminal charges from using his weapon without justification. Thus, in her rebuttal argument, the prosecutor responded that Le-France was legally justified in shooting defendant. "A prosecutor may fairly respond to an issue raised by the defendant." *Brown*, 279 Mich App at 135.

Finally, defendant argues that he was denied a fair trial because, on multiple occasions during closing argument, the prosecutor misstated the law when she told the jury that merely having one's hands in a pocket is sufficient evidence of the "armed" element of armed robbery. Defendant further asserts that neither defense counsel nor the trial judge ever specifically corrected these misstatements, which went to a crucial, disputed element of the offense for which defendant was convicted. Defendant concludes that the prosecutor's misstatement of the law very likely resulted in defendant's conviction of assault with intent to rob while armed rather than unarmed robbery, and therefore, the error was not harmless. We disagree.

The prosecutor did make a clear misstatement of law in closing argument when she said, "the law says hands in the pocket is enough" to meet the armed element of assault with intent to rob while armed. In fact:

> [T]here must be some objective evidence of the existence of a weapon or article before a jury will be permitted to assess the merits of an armed robbery charge. For example, an object pointing out from under a coat, together with statements threatening a victim with being shot, clearly satisfies the statutory definition of armed robbery. In such a case, there is evidence of actual possession of a weapon or article and the testimony regarding statements that, if believed, make clear an intent to convince the victim of the existence of such a weapon or article. [*People v Banks*, 454 Mich 469, 474; 563 NW2d 200 (1997), quoting *Jolly*, 442 Mich at 468-469.]

In *Banks*, the robbery victim testified that she never saw a weapon, but rather, the defendant had his hand in his pocket and "just kind of moved it around a little bit." *Id*. at 471. The Court concluded that this testimony was not sufficient to sustain a conviction for armed robbery. *Id*. at 475.

Nevertheless, while "[a] prosecutor's clear misstatement of the law that remains uncorrected may deprive a defendant of a fair trial . . . if the jury is correctly instructed on the law, an erroneous legal argument made by the prosecutor can potentially be cured." *People v Grayer*, 252 Mich App 349, 357; 651 NW2d 818 (2002). In this case, the court instructed the jury: "it's my duty to instruct you on the law. You must take the law as I give it to you. If a lawyer says something different about the law, follow what I say." Further, "[t]he lawyers' statements and arguments are not evidence. They're only meant to help you understand the evidence and each side's legal theories. . . . You should only accept things the lawyers say that are supported by the evidence and your common sense and general knowledge." Finally, the court instructed the jury on the crime of assault with intent to commit armed robbery. When discussing the elements of armed robbery, the court stated that the fourth element was that:

> while in the course of committing the larceny, the defendant, one, possessed a weapon designed to be dangerous and capable of causing death or serious injury; or two, possessed any object capable of causing death or serious injury that the defendant used as a weapon; or [three], possessed any other object used or fashioned in a manner to leave the person who was present to reasonably believe that it was a dangerous weapon; or [four], represented orally or otherwise that he was in possession of a weapon.

More importantly, as also discussed above, Le-France, in fact, testified that he saw defendant with a gun, not merely "hands in his pocket." We are satisfied that the erroneous legal argument made by the prosecutor was cured through the proper jury instructions.

Defendant next argues that he is entitled to resentencing because Prior Record Variable 2 and Offense Variable 4 were scored incorrectly. We agree that the trial court improperly assessed ten points for OV 4, and therefore, defendant is entitled to resentencing.

The interpretation of statutory sentencing guidelines is reviewed de novo. *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). An appellate court must affirm a sentence that is within the appropriate guidelines range unless there is "an error in scoring the sentencing guidelines or reliance on inaccurate information in determining the sentence . . . . Scoring decisions for which there is any evidence in support will be upheld." *Id.* Thus, this Court reviews the scoring to determine "whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *McLaughlin*, 258 Mich App at 671. Findings of fact at sentencing are reviewed for clear error. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008).

Defendant first challenges the trial court's scoring of five points for PRV 2. Defendant notes that he has only two prior felonies: assault with intent to rob while armed, which was scored under PRV 1, and the felony-firearm attached to that conviction.[4] Defendant argues that, under a strict statutory interpretation of MCL 777.52(2), felony-firearm is not a prior low severity offense as defined by the statute. We disagree.

This issue involves statutory interpretation, the primary goal of which is:

> to ascertain and give effect to the intent of the Legislature. The first criterion in determining intent is the specific language of the statute. The Legislature is presumed to have intended the meaning it plainly expressed. Criminal statutes must be strictly construed, with each word interpreted according to its ordinary usage and common meaning. [*People v Noble*, 238 Mich App 647, 658-659; 608 NW2d 123 (1999).]

Pursuant to MCL 777.52(1)(d), an offender is assessed five points for PRV 2 if he has "one prior low severity felony conviction." As explained by MCL 777.52(2):

> As used in this section, "prior low severity felony conviction" means a conviction for any of the following, if the conviction was entered before the sentencing offense was committed:
>
> (a) A crime listed in offense class E, F, G, or H.
>
> (b) A felony under a law of the United States or another state that corresponds to a crime listed in offense class E, F, G, or H.
>
> (c) A felony that is not listed in offense class M2, A, B, C, D, E, F, G, or H and that is punishable by a maximum term of imprisonment of less than 10 years.

[4] The prosecutor observes that the lower court did not specify which of defendant's prior offenses it used for the purposes of scoring PRV2, but agrees that the only prior felony conviction that could have been scored under this variable is defendant's 2001 felony-firearm conviction.

> (d) A felony under a law of the United States or another state that does not correspond to a crime listed in offense class M2, A, B, C, D, E, F, G, or H and that is punishable by a maximum term of imprisonment of less than 10 years.

In making his argument, defendant relies on *People v Martin*, unpublished opinion per curiam of the Court of Appeals, issued May 11, 2006 (Docket No. 259716), which was decided before the statute was amended to its current version.[5] In *Martin*, this court explained:

> The trial court was incorrect in its scoring of PRV2. Pursuant to MCL 777.52(1)(d), the court may score PRV2 at five points if the defendant has one prior low severity felony conviction. A prior low severity felony conviction consists of a conviction for a crime listed in offense class E, F, G or H. MCL 777.52(2). The prosecution argues that felony-firearm is a class G crime because it carries a mandatory sentence of two years' imprisonment. However, because felony-firearm has a mandatory two-year sentence, it is not covered by the sentencing guidelines. Although felony-firearm is in the same group of offenses as carrying a concealed weapon, MCL 750.227, unlawful possession of a pistol, MCL 750.227a, and possessing a loaded firearm in or upon a vehicle, MCL 750.227c, these offenses are specifically classified as E, F, G or H crimes. MCL 777.16m. Felony-firearm is not specifically listed as a class E, F, G, or H offense, and therefore, a strict statutory interpretation of MCL 777.52(2) leads this Court to conclude that felony-firearm is not a prior low severity offense as defined by MCL 777.52(2). [*Id*. slip op, p 3.]

Subsequent to *Martin*, however, MCL 777.52 was amended. P.A.2006, No. 655, rewrote subsection (2), which previously read:

> As used in this section, 'prior low severity felony conviction' means a conviction for a crime listed in offense class E, F, G, or H or for a felony under a law of the United States or another state that corresponds to a crime listed in offense class E, F, G, or H, if the conviction was entered before the sentencing offense was committed."

The statute now includes in the definition of a prior low severity felony "a felony that is not listed in offense class M2, A, B, C, D, E, F, G, or H and that is punishable by a maximum term of imprisonment of less than 10 years." It is undisputed that felony-firearm is not listed in any of the offense classes. It is also undisputed that a first offense for felony-firearm carries a mandatory two-year sentence (MCL 750.227b(1)--less than the 10 year maximum referenced in MCL 777.52(2). Thus, felony-firearm fits the plain wording of the above definition and defendant has offered no substantive authority suggesting otherwise.

Defendant also contends that the Legislature's intent to exclude felony-firearm from the scoring of the prior record and offense variables is evidenced by the intentional omission of that

[5] Pursuant to MCR 7.215(C)(1), unpublished opinions are not binding.

offense from the list of scoreable offenses, and the instructions in PRV 7 and OV 12 that felony-firearm convictions should not be counted when scoring these variables. We disagree.

As defendant observes, both PRV 7 and OV 12 specifically instruct the sentencing court not to score a felony-firearm conviction for those variables. Whereas defendant finds that these provisions support his position, however, we conclude that the fact that the Legislature specifically excluded the scoring of felony-firearm from other provisions, but did not do so when it amended MCL 777.52, is evidence that the Legislature intended that felony-firearm to be scored under PRV 2. "The omission of a provision in one statute that is included in another statute should be construed as intentional, and provisions not included by the Legislature may not be included by the courts." *People v Wallace*, 284 Mich App 467, 469-470; 772 NW2d 820 (2009), quoting *Donkers v Kovach*, 277 Mich App 366, 371; 745 NW2d 154 (2007). Therefore, the trial court did not err in scoring PRV 2 on the basis asserted by defendant.

We do agree, however, that OV 4 was scored incorrectly. Pursuant to MCL 777.34(1)(a), ten points are assessed on OV 4 when "[s]erious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(2) provides, "[s]core 10 points if the serious psychological injury may require professional treatment. In making this determination, however, the fact that treatment has not been sought is not conclusive."

In this case, with respect to the scoring of OV 4, the court ruled:

> The court did have an opportunity to preside over this case. . . . [T]here was evidence in the record from the testimony of the complainant about how emotionally he was affected by this event, as well as testimony from his supervisor as to how he acted when he talked to him. . . . Whether he [was] assaulted is not conclusive. I think given those circumstances that there's ample evidence in the record to support that, so I will find that OV 4 should be scored at ten points.

It is true that this Court has held that, where a victim "testified that she was fearful during the encounter with defendant . . . the evidence presented was sufficient to support the trial court's decision to score OV 4 at ten points." *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004). In this case, however, Le-France did not respond to requests for a victim impact statement in the presentence investigation report. Furthermore, despite what the court said, Le-France gave no testimony indicating that he suffered psychological injury, or even that he was afraid. He did say that when he saw defendant he knew he was "in trouble," and further, "I pulled my weapon because I felt I was in danger."

There was some testimony regarding Le-France's mental state. Officer Richardson, who first responded to the scene and spoke with Le-France, described Le-France as "upset, shaken, bleeding." Kaminsky, the Air Marshal supervisor, testified that Le-France seemed "very upset" when he called immediately after the incident. When asked about Le-France's state of mind:

> He seemed very excited – very – I'd say exited. Not agitated. He was very – talking in a fast manner trying to advise me that he was involved in an incident. . . . He advised me that he was involved in an incident. . .that he was in a shooting; and that he was hit. . . .

> He told me that he was hit. He told me that he was hit in the head, and I tried to keep him on the phone with me until medical assistance arrived. He told me he had to get off the phone to call his girlfriend to advise her what happened.

Thus, although *Apgar* appears to set the bar very low, in this case, there was no evidence of Le-France's being frightened, only that he felt he was in danger, and was "upset" and "excited."

Defendant's PRV score is 50, putting him at level E for a Class A offense. Subtracting ten points from his OV score for the incorrect scoring of OV 4 leaves him with a total of 15 points instead of 25, and therefore, his OV level would be I instead of II on the Class A grid. As a second habitual offender, defendant would now have a minimum sentence range of 81 to 168 months, instead of 108 to 225 months. MCL 777.62. "Resentencing is an appropriate remedy where a defendant's sentence is based on an inaccurate calculation of the sentencing guidelines range and, therefore, does not conform to the law." *People v Underwood*, 278 Mich App 334, 337; 750 NW2d 612 (2008). Because defendant's guidelines were calculated incorrectly, he is entitled to resentencing.

Defendant next argues that he is entitled to resentencing because the carjacking statute does not contemplate consecutive sentencing, because the trial court imposed a disproportionate sentence, and because he is entitled to credit for time spent in custody prior to sentencing. We disagree.

Defendant did not raise the issues of consecutive sentencing, proportionality, or jail credit in the trial court, and therefore, these issues are not preserved for appeal. *People v Metamora Water Serv*, 276 Mich App 376, 382; 741 NW2d 61 (2007). Nevertheless, "[t]his Court may consider an unpreserved question of law where the facts necessary for its resolution have been presented." *People v Houston*, 237 Mich App 707, 712; 604 NW2d 706 (1999). "Whether the trial court properly sentenced a defendant to consecutive sentences is a question of statutory interpretation that is reviewed de novo." *People v Gonzalez*, 256 Mich App 212, 229; 663 NW2d 499 (2003).

According to defendant, the trial court improperly ordered his carjacking sentence to run consecutively with his assault with intent to rob while armed sentence because the assault with intent to commit armed robbery was not a separate offense arising out of the same transaction, but that the two offenses were instead one and the same. We disagree.

"A consecutive sentence may be imposed only if specifically authorized by law." *People v Spann*, 250 Mich App 527, 529; 655 NW2d 251 (2002). Pursuant to the carjacking statute, "[a] sentence imposed for a violation of this section may be imposed to run consecutively to any other sentence imposed for a conviction that arises out of the same transaction." MCL 750.529a(3). Although defendant asserts that the assault with intent to rob while armed "was not *a separate offense* arising out of the same transaction," the carjacking statute provided above plainly states that consecutive sentences are permissible for a separate "*conviction* that arises out of the same transaction." Defendant was convicted of both carjacking and assault with intent to rob while armed, both arising out of the same transaction, i.e., defendant's attempt to steal Le-France's vehicle. Furthermore, this Court has addressed this issue when discussing the carjacking and armed robbery statute in terms of double jeopardy, holding:

> *In the carjacking statute, the Legislature specifically authorized two separate convictions arising out of the same transaction*. Although the Double Jeopardy Clauses restrict courts from imposing more punishment than that intended by the Legislature, *the Legislature may authorize cumulative punishment of the same conduct under two different statutes*. *From the subject and language of these statutes, we can conclude that the Legislature intended multiple punishments for violations of different social norms*. [*People v Parker*, 230 Mich App 337, 343-344; 584 NW2d 336 (1998) (emphasis added).]

The above holding remains true regardless of how the argument is framed. The consecutive sentences were thus permissible and defendant's argument is without merit.

Defendant next argues that the trial court failed to exercise discretion when deciding to impose consecutive sentences, and did not explain why a minimum sentence of 18 years was not long enough. Defendant asserts that the appropriate sentence in this case was doubled, making the minimum sentence 36 years when the sentencing guidelines provide that a proportionate sentence would be in the range of nine to 18 years. Thus, defendant concludes that his sentence was not proportionate and he should be resentenced. We disagree.

"A given sentence constitutes an abuse of discretion if that sentence violates the principle of proportionality, which requires that the sentence be proportional to the seriousness of the circumstances surrounding the offense and offender." *People v Lowery*, 258 Mich App 167, 172; 673 NW2d 107 (2003). However, "[i]n determining the proportionality of an individual sentence, this Court is not required to consider the cumulative length of consecutive sentences. Rather, our inquiry is whether each sentence is proportionate." *People v St John*, 230 Mich App 644, 649; 585 NW2d 849 (1998). In this case, although the guidelines must be recalculated as discussed above, it appears that the trial court did not intend to depart from the guidelines, and therefore, proportionality is not at issue and defendant's argument is without merit.

Finally, defendant asserts that he is entitled to credit for time spent in the county jail while awaiting trial and sentencing in the instant case, even though he was on parole at the time of the instant offense. We disagree.

Pursuant to MCL 769.11b:

> Whenever any person is hereafter convicted of any crime within this state and has served any time in jail prior to sentencing because of being denied or unable to furnish bond for the offense of which he is convicted, the trial court in imposing sentence shall specifically grant credit against the sentence for such time served in jail prior to sentencing.

Our Supreme Court has addressed the specific issue raised by defendant:

> [T]he jail credit statute does not apply to a parolee who is convicted and sentenced to a new term of imprisonment for a felony committed while on parole because, once arrested in connection with the new felony, the parolee continues to serve out any unexpired portion of his earlier sentence unless and until discharged by the Parole Board. For that reason, he remains incarcerated regardless of

> whether he would otherwise be eligible for bond before conviction on the new offense. He is incarcerated not "because of being denied or unable to furnish bond" for the new offense, but for an independent reason. [*People v Idziak*, 484 Mich 549, 562-563; 773 NW2d 616 (2009).]

As in *Idziak*, the jail credit statute, MCL 769.11b, does not apply to defendant.

Defendant next argues that he was denied a fair trial because two statements he gave to police, as well as his waiver of *Miranda*[6] warnings prior to the second statement were involuntary. With respect to his first statement, defendant specifically argues that because his statement was given shortly after he had been shot five times, and he was in extreme pain and heavily medicated, the statement was not understanding and voluntarily. We disagree.

"[U]nder *Miranda* [*v Arizona*, 384 US 436, 479; 86 S Ct 1602; 16 L Ed 2d 694 (1966)], every person subject to interrogation while in police custody must be warned, among other things, that the person may choose to remain silent in response to police questioning." *People v Shafier*, 483 Mich 205, 212; 768 NW2d 305 (2009). "The term 'custodial interrogation' means 'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of [his] freedom of action in any significant way.'" *Coomer*, 245 Mich App at 219, quoting *People v Hill*, 429 Mich 382, 387; 415 NW2d 193 (1987). In determining whether a defendant was in custody at the time of the interrogation, this Court looks at

> the totality of the circumstances, with the key question being whether the accused reasonably could have believed that [he] was not free to leave. The determination of custody depends on the objective circumstances of the interrogation rather than the subjective views harbored by either the interrogating officers or the person being questioned. [*Id*. at 219-220.]

Nevertheless, "[p]olice are not required to read Miranda rights every time a defendant is questioned." *People v Littlejohn*, 197 Mich App 220, 223; 495 NW2d 171 (1992). Indeed, "a police officer may ask general on-the-scene questions to investigate the facts surrounding the crime without implicating the holding in *Miranda*." *People v Ish*, 252 Mich App 115, 118; 652 NW2d 257 (2002). Furthermore, the fact that a defendant is in the hospital does not automatically imply that the environment is coercive where the defendant has not been formally arrested nor "subjected to a restraint on freedom of movement of the degree associated with a formal arrest." *People v Kulpinski*, 243 Mich App 8, 25-26; 620 NW2d 537 (2000).

> The ultimate question whether a person was "in custody" for purposes of *Miranda* warnings is a mixed question of fact and law, which must be answered independently by the reviewing court after review de novo of the record. This is so because an 'in-custody' determination calls for application of the controlling legal standard to the historical facts. Findings concerning the circumstances surrounding the giving of a statement are factual findings that are reviewed for

[6] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

> clear error. A finding is clearly erroneous if, after reviewing the entire record, an appellate court is left with a definite and firm conviction that a mistake has been made. [*People v Coomer*, 245 Mich App 206, 219; 627 NW2d 612 (2001) (internal citations omitted).]

In the case at bar, Officer Senter testified that, on June 6, 2008, he responded to St. John's Hospital, having received information that the person shot at the Coney Island had gone there. Officer Senter got to the hospital within minutes of receiving this information and observed defendant, whom he identified in court, with gunshot wounds to the abdomen, chest and hand. When Officer Senter observed defendant "he was laying on a gurney in the resuscitation area." Officer Senter asked defendant what happened and defendant responded that, "he was robbed at a Coney Island on Warren near Chalmers." When defendant testified at trial, he explained that he lied to Officer Senter because he "was scared," and "didn't want to get arrested for attempting to steal somebody's car." At the post-trial evidentiary hearing, however, defendant alleged that he did not remember his conversation with Officer Senter. Regardless, defendant's Fifth Amendment rights were not implicated in this situation because, like the defendant in *Kulpinski*, although defendant was in the hospital, he was not under arrest or otherwise in custody. Further, Officer Senter did not conduct an extensive interrogation of defendant, but rather, he asked one general question to investigate the facts surrounding the crime, *Ish*, 252 Mich App at 118, and defendant indicated that he had been robbed at the Coney Island. Therefore, *Miranda* warnings were not required and defendant's June 6, 2008, statement was admissible.

Defendant made a second statement to Sergeant Miller shortly after noon on June 7, 2008, after waiving his *Miranda* rights. Defendant argues that, at the time, he was weakened by pain and shock and was under the influence of morphine and other pain medication, isolated from family, friends and legal counsel, and, as a result, his will was overborne. Thus, defendant concludes that he could not have voluntarily waived his *Miranda* rights before his second statement and the statement should have been suppressed. We disagree.

> We review de novo a trial court's determination that a waiver was knowing, intelligent, and voluntary. When reviewing a trial court's determination of voluntariness, we examine the entire record and make an independent determination. But we review a trial court's factual findings for clear error and will affirm the trial courts findings unless left with a definite and firm conviction that a mistake was made. Deference is given to a trial court's assessment of the weight of the evidence and the credibility of the witnesses. [*People v Gipson*, 287 Mich App 261, 264; 787 NW2d 126 (2010).]

When determining whether waiver of *Miranda* rights was voluntary, knowing, and intelligent, "[o]nly if the 'totality of the circumstances surrounding the interrogation' reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived." *People v Daoud*, 462 Mich 621, 633-634; 614 NW2d 152 (2000), quoting *Moran v Burbine*, 475 US 412, 421; 106 S Ct 1135; 89 L Ed 2d 410 (1986). The totality of the circumstances test includes a consideration of:

> [1] the age of the accused; [2] his lack of education or his intelligence level; [3] the extent of his previous experience with the police; [4] the repeated and

> prolonged nature of the questioning; [5] the length of the detention of the accused before he gave the statement in question; [6] the lack of any advice to the accused of his constitutional rights; [7] whether there as an unnecessary delay in bringing him before a magistrate before he gave the confession; [8] whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; [9] whether the accused was deprived of food, sleep, or medical attention; [10] whether the accused was physically abused; and [11] whether the suspect was threatened with abuse. No single factor is determinative. [*People v Tierney*, 266 Mich App 687, 708; 703 NW2d 204 (2005).]

"[T]he prosecution has the burden of establishing a valid waiver by a preponderance of the evidence." *Daoud*, 462 Mich at 634.

In this case, Sergeant Miller testified that prior to taking his written statement, she read defendant his *Miranda* rights. Defendant then signed the form, indicating that he understood his rights. The constitutional rights form and written statement were dated June 7, 2008, at noon and 12:05 p.m., respectively. Sergeant Miller wrote out the questions and answers, and defendant had the opportunity to look at his statement and make corrections if he wanted to, but he agreed that the statement was accurate and then signed it.

Sergeant Miller denied that defendant was heavily medicated at the time she spoke to him and asserted that he was responsive to her questions. Sergeant Miller did not have any reason to believe that defendant was under the influence of any medication, drugs, or alcohol that would affect his ability to know what was going on, or that defendant had a lack of food or water that affected his ability to understand. In fact, Sergeant Miller spoke to some nurses before talking to defendant, in order to determine whether he was on medication and if he was coherent. The nurses told her that defendant was coherent, and defendant never told Sergeant Miller that he was in pain or on morphine during their conversation. Further, Sergeant Miller did not recall seeing defendant hooked up to an I.V. or heart monitor, and he was not hooked up to a respirator. Finally, Sergeant Miller did not threaten defendant or make any promises to him.

In his statement to Sergeant Miller, defendant admitted that he intended to steal a car, and after seeing Le-France's truck, decided to steal that one in particular. Defendant further admitted that he ran up to the truck and yelled "get your punk a** up," trying to scare Le-France. Defendant denied having a firearm. At trial, defendant's testimony was similar to the statement he gave to Sergeant Miller: he admitted that he intended to steal a car, ran up to Le-France's vehicle, and told Le-France "get your punk a** out." Defendant again denied having a gun or threatening to shoot Le-France. He acknowledged making both statements to police and signing his statement to Sergeant Miller.

Nevertheless, at the evidentiary hearing, defendant stated that he was in extreme pain at the time he spoke to Sergeant Miller. When asked if remembered the questions and answers, he stated, "No, not really. It was just a bunch of questions and answers back and forth." Further, he felt as though he had to answer the questions, "I really, like, couldn't hold back or resist due to the injuries and the medications." He also stated that he was confused at the time.

Dr. Ronald Thies, an emergency room physician, testified that, while in the emergency room on June 6, 2008, defendant received eight milligrams of morphine, administered at 3:48

a.m. and two milligrams of ancef (an antibiotic), administered at 3:51 a.m. Dr Thies explained, "the effects of morphine can cause sedation, relaxation, can cause some difficulty with reasoning, and can cause some confusion at times, as well as pain relief. Dr. Thies stated that, about a half hour to 40 minutes after defendant arrived at the hospital, defendant went directly to the operating room.

Defendant had surgery on his hand on June 7, 2008, from 7:44 a.m. to 9:15 a.m. and hospital records indicated that defendant had a pain level of eight out of ten at about noon on that day. Dr. Thies stated that defendant received Vicodin and morphine at various times while he was in the hospital but the doctor "could not find exactly any administration during that morning[7] other than the medications he received at the actual procedure . . . ." When asked if a pain score of eight out of ten could affect a person's mental state, the doctor explained, "it can . . . potentially cause some confusion and agitation of patients when they have significant or a lot of pain." It could also cause a lack of focus or lack of concentration. Upon questioning by the court, however, the doctor stated that, while he did not have "absolute recollection" of the case, "based on reviewing the record, it appears [defendant] was answering questions appropriately."

The fact that defendant's testimony at trial mirrored his contested statement, and that he only later changed his story at the evidentiary hearing, indicates that his June 7, 2008, statement was voluntary. Moreover, even if defendant was under the influence of pain medication, both Sergeant Miller and Dr. Thies testified that he appropriately responded to questions. Similarly, in *Tierney*, this Court upheld a confession where the defendant was intoxicated, nevertheless, "[the] defendant was coherent and rational, he understood the questions posed to him and answered them appropriately, and he was able to assist officers in creating a written record of the interview." *Tierney*, 266 Mich App at 709.

Looking at the other voluntariness factors, defendant, a 25-year old parolee, had previous experience with the criminal justice system, the questioning was relatively brief, and although he was injured and in the hospital, he had not been deprived of any food, water, or medical attention. *Tierney*, 266 Mich App at 708. Therefore, defendant's waiver of *Miranda* rights and resulting statement were voluntary and admitting the statement did not deny him a fair trial.

Finally, defendant argues in both his brief on appeal and standard 4 brief, that he was denied the effective assistance of counsel. We disagree.

"The determination whether a defendant has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. Findings on questions of fact are reviewed for clear error, while rulings on questions of constitutional law are reviewed de novo." *Seals*, 285 Mich App at 17. In this case, an evidentiary hearing was held on the issue of whether defense counsel was ineffective for failing to move for suppression of defendant's statements,

[7] It is not entirely clear from the testimony, but we presume that Dr. Thies was referring to the morning of June 7, 2008, when defendant had surgery on his hand, and then later made the statement to Sergeant Miller.

but with respect to defendant's other grounds for ineffective assistance, "review is limited to the facts on the record." *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

"An accused's right to counsel encompasses the right to the 'effective' assistance of counsel." *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007), citing US Const Am VI, Const 1963, art 1, § 20, and *Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Generally, to establish ineffective assistance of counsel, a defendant must show that: "(1) counsel's performance was below an objective standard of reasonableness under professional norms and (2) there is a reasonable probability that, if not for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable." *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007), citing *Strickland*, 466 US at 694. "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

Defendant argues, in both his brief on appeal and Standard 4 brief, that he received ineffective assistance of counsel because trial counsel, Bryan Sherer, failed to move for suppression of defendant's statements. Defendant asserts that Sherer did not move to suppress because he believed that defendant was taking Tylenol 3, but there is no basis for that conclusion. Rather, according to defendant, the records and testimony indicate that defendant was administered eight milligrams of morphine on June 6, 2008, and he was authorized to receive morphine and hydrocodone (Vicodin) as needed on June 6, and June 7, 2008. Sherer did not talk to defendant's doctor or anyone else at the hospital, yet came to the conclusion that there was no basis for a suppression motion. Defendant concludes that admission of the statements was prejudicial because the prosecutor used defendant's alleged admission that he wanted to scare Le-France as evidence of robbery and she used his first statement against him as a false exculpatory statement. We disagree.

As previously indicated, defendant was not in custody when he gave his first statement, and thus *Miranda* was not implicated. Furthermore, as also discussed above, defendant's waiver of *Miranda* rights and resulting second statement were both voluntary and thus admissible. Because any motion premised upon the alleged inadmissibility of defendant's statements would be futile and, "[i]t is well established that defense counsel is not ineffective for failing to pursue a futile motion" *Brown*, 279 Mich App at 142, defendant's claim of ineffective assistance related to his statements to police fails.

Furthermore, defendant cannot show that Sherer was ineffective for failing to undertake a reasonable investigation. "A sound trial strategy is one that is developed in concert with an investigation that is adequately supported by reasonable professional judgments. Counsel must make an independent examination of the facts, circumstances, pleadings and laws involved. This includes pursuing all leads relevant to the merits of the case." *People v Grant*, 470 Mich 477, 486-487; 684 NW2d 686 (2004). An appellate court must "evaluate defense counsel's performance from counsel's perspective at the time of the alleged error and in light of the circumstances. Thus, counsel's words and actions before and at trial are the most accurate evidence of what his strategies and theories were at trial." *Id*.

Sherer's testimony at the evidentiary hearing indicated that he conducted an investigation at defendant's request. Sherer testified that he obtained and reviewed defendant's medical

records prior to trial. When asked why he did not file a motion to suppress, Sherer explained that, after reviewing the medical records, he determined that defendant was taking Tylenol 3. As discussed in above, Dr. Thies testified, and defendant concedes, that defendant had received morphine shortly after arriving at the hospital, but it was not clear what pain medication he was given after that, although Vicodin had been prescribed. Although Sherer misidentified the pain medication as Tylenol 3, he concluded that "there was nothing really to overbear [defendant's] voluntariness towards the statement itself. He wasn't on any high-powered medications." This does not contradict Dr. Thies's testimony that Vicodin is a "less potent pain medication than morphine."

Although Sherer had not spoken to Dr. Thies or any of the nurses, Sherer stated that, after speaking to defendant, he determined that defendant "understood what was going on" at the time he made the June 6, 2008, statements. There was no indication that the statements were made under duress and defendant gave no indication that his surgery affected his June 7, 2008, statements. Sherer explained, "I asked him, you know, did you understand what was going on around you . . . . I think even in the medical records it was even said that he was oriented as to time, place and manner, so, I mean, that kind of coincides with what he had originally told me." And, as stated above, Dr. Thies indicated that defendant appropriately responded to questions.

Although defendant testified at the evidentiary hearing that, at the preliminary examination, he told Sherer that he did not remember making the statements, when asked if defendant ever told Sherer that the statements were not voluntary or intelligent, defendant answered, "Yes. I told him I wasn't able to sign the statement or the waiver forms because my right hand was heavily bandaged and I'm not able to write with my left hand." Defendant's response does not, in fact, implicate voluntariness. Thus, defendant cannot show that defense counsel failed to make a reasonable investigation.

Defendant also argues that counsel was ineffective for failing to object to the (1) prosecutor's misstatements of the law, (2) the prosecutor's improper vouching for Le-France's credibility, (2) Le France's testimony on the bullet fragment, and (3) the scoring of PRV 2 and OV 4. We disagree.

For the reasons discussed above, the prosecutor did not improperly vouch for Le-France's credibility and PRV 2 was scored properly. Counsel is not ineffective for failing to make a futile objection, *Thomas*, 260 Mich App at 457, and "by analogy, counsel is not required to make a groundless objection at sentencing," *People v Rodriguez*, 212 Mich App 351, 356; 538 NW2d 42 (1995). Although Le-France's testimony regarding the bullet fragment and the prosecutor's misstatement of the law were improper, as discussed above, these errors did not result in an unfair trial and were not outcome determinative. Finally, although the scoring of OV 4 was improper, it was not outcome determinative because it did not affect the jury's decision finding defendant guilty.

Defendant also argues in his standard 4 brief that, at the preliminary examination, trial counsel was ineffective because he stipulated to the reading of Sergeant Miller's statement into the record. According to defendant, her testimony was the prosecution's only evidence of defendant's guilt, and counsel may not stipulate to facts which amount to a functional equivalent of a guilty plea. We disagree.

First, it should be noted that Sergeant Miller's testimony was not the only evidence of defendant's guilt, because defendant himself testified that he intended to steal a car, ran up to Le-France's vehicle, and ordered him to get out. And, Le-France testified concerning the facts surrounding the incident. More importantly, allowing Sergeant Miller's testimony to be read into the record at the preliminary examination is not the functional equivalent of a guilty plea; it was merely evidence that the district court used to determine whether there was probable cause to bind the matter over for trial, and defendant has provided no authority suggesting otherwise.

Defendant next argues that trial counsel was ineffective for failing to object to Sergeant Miller's trial testimony that defendant was not heavily medicated when she spoke to him – which defendant claims was contradicted by the medical testimony – and for failing to adequately cross-examine Sergeant Miller with this information. We disagree. First, "one cannot object simply because one thinks a witness is lying. The veracity of a witness is a matter for the trier of fact to discern." *Odom*, 276 Mich App at 416. Thus, "counsel was not ineffective for failing to object to testimony on this basis." *Id*. Second, "[d]ecisions regarding . . . how to question witnesses are presumed to be matters of trial strategy," which this Court will not second guess on appeal. *Horn*, 279 Mich App at 39.

Defendant next argues that trial counsel wrongfully stipulated to the waiver of testimony from the forensic scientist regarding whether defendant's blood was at the crime scene. According to defendant, counsel's error was compounded when he waived testimony from the state police crime lab regarding the firearm used, in light of testimony from Officer Richardson that Le-France told him that the perpetrator had a 38-caliber revolver, whereas in his trial testimony, Le-France stated that the gun was either a 22-caliber or nine-millimeter pistol. We disagree.

In this case, the parties stipulated that an analysis of the blood samples taken from the scene, the red Chevy Cobalt, and defendant, indicated that all the blood came from defendant. Defendant does not state any ground on which the blood sample evidence would be inadmissible, and thus, "decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, which we will not second-guess with the benefit of hindsight." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Moreover, there could be no prejudice to defendant from this evidence because there is no dispute that defendant sustained multiple gunshot wounds, and defendant himself testified at trial that he was shot at the Coney Island and drove to the hospital in the Cobalt.

The parties also waived the testimony of a representative of the State Police Crime Lab on firearms evidence, because, according to the prosecutor, "I don't think that he could add anything to the matter since [defendant's] gun wasn't picked up . . . ." Defense counsel agreed. This decision was also a matter of trial strategy. Moreover, defendant cannot show prejudice, because the evidence that *was* presented indicated that all of the casings found by the Detroit police came from Le-France's gun. While a federal air marshal also found a nine-millimeter casing, it could not be matched to any gun possessed by defendant. Furthermore, defense counsel through questioning, cross-examination, and closing argument, implied that this casing was planted at the scene. Finally, the jury acquitted defendant of three of the weapons charges. Therefore, even if it were error to waive the firearms testimony, defendant cannot show prejudice, and defendant has not met his burden of showing ineffective assistance of counsel.

Affirmed, but remanded for resentencing. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Brian K. Zahra
/s/ Pat M. Donofrio